

JUN 20 2007

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Texans for Truth

) 2007 JUN 20 A 9:15
) MUR 5542
) **SENSITIVE**

GENERAL COUNSEL'S REPORT #2

I. ACTIONS RECOMMENDED

(1) Find probable cause to believe that Texans for Truth violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee; (2) find probable cause to believe that Texans for Truth violated 2 U.S.C. § 441a(f) by knowingly accepting excessive contributions; (3) and (4) take no further action with respect to the reason to believe finding that Texans for Truth violated 2 U.S.C. § 441b(a).

II. BACKGROUND

The Commission previously found reason to believe that Texans for Truth ("TFT") violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee with the Commission, by failing to report contributions and expenditures, by knowingly accepting contributions in excess of \$5,000, and by knowingly accepting corporate and/or union contributions. The ensuing investigation confirmed and uncovered additional evidence that TFT accepted over \$1,000 in contributions for the purpose of defeating President George W. Bush in the 2004 presidential election. The investigation also confirmed that TFT satisfied the major purpose test and triggered political committee status in September 2004, but failed to register and report with the Commission, and subsequently accepted over \$100,000 in excessive contributions. *See* General Counsel's Brief ("GC Brief") at 15.

we served

the General Counsel's Brief, which is hereby incorporated by reference, on December 18, 2006.

28044184701

1 In its initial and supplemental responses to the GC Brief, TFT argues that it is not a political
2 committee because it did not receive federal contributions. *See* Response Brief filed January 31,
3 2007 ("TFT Response"), at Attachment 1, and Supplemental Response Brief filed February 23,
4 2007, at Attachment 2. TFT further argues that an application of the major purpose test is not
5 appropriate because TFT's activities did not meet the statutory triggers for political committee
6 status.

7 The factual record developed during the investigation shows that TFT raised and spent
8 over \$500,000 for political campaign activity, including disbursements for an advertising
9 campaign in "key swing states" criticizing President Bush during September and October 2004,
10 and has been virtually inactive since the 2004 election. *See* GC Brief at 2-9 Moreover, TFT's
11 solicitations to potential donors made it clear that the funds received would be used to target the
12 defeat of a clearly identified candidate by financing advertisements to "American voters" in "key
13 swing states" opposing the election of President Bush. *See id* at 7-9. With these solicitations,
14 TFT raised well over \$1,000 in contributions. *See id* at 9-10. As a result, TFT, which had the
15 major purpose of defeating President Bush in the 2004 election, had a duty to register and report
16 with the Commission and to abide by the Act's contribution limits, which it failed to do. *See id*
17 at 10-14.

18 Accordingly, for the reasons set forth in the GC Brief and discussed below, we
19 recommend that the Commission find probable cause to believe that TFT violated 2 U.S.C.
20 §§ 433 and 434 by failing to register as a political committee with the Commission and report its
21 contributions and expenditures and violated 2 U.S.C. § 441a(f) by knowingly accepting
22 excessive contributions.

28044184702

The Commission also found reason to believe that TFT violated 2 U.S.C. § 441b(a) by knowingly accepting corporate and/or labor organization contributions. The investigation revealed no evidence that TFT accepted such contributions in this matter. Accordingly, we recommend that the Commission take no further action with respect to the 2 U.S.C. § 441b(a) reason to believe finding.

III. ANALYSIS

A. **Texans for Truth Failed to Register and Report as a Political Committee in Accordance with 2 U.S.C. §§ 433 and 434**

As set forth in the GC Brief, TFT exceeded the statutory threshold for political committee status by receiving contributions exceeding \$1,000 in response to fundraising solicitations clearly indicating that funds received would be used to target the defeat of a specific candidate in the 2004 presidential election. As a result of these contributions, and because its major purpose was political campaign activity, TFT should have registered as a political committee, disclosed its receipts and disbursements to the public through reports filed with the Commission, and complied with the Act's contribution limits.

1. Texans for Truth Exceeded the \$1,000 Statutory Threshold by Receiving Contributions

TFT does not dispute that it received more than \$1,000 in response to the fundraising solicitations issued by TFT that are attached to this Report. *See* Attachment 3. Although TFT ultimately takes issue with our conclusion that these solicitations clearly indicated that funds received would be targeted to the defeat of a clearly identified federal candidate, TFT primarily argues that the solicitation language is irrelevant. Specifically, TFT argues that it was not required to register as a political committee because, under Commission regulations in place in

28044184703

2004, the language of the solicitations was irrelevant to determining whether the resulting funds were contributions for the purpose of the registration and reporting requirements of the Act. *See* TFT Response at 4-9. TFT first argues that a finding that funds received in response to its solicitations constituted "contributions" requires retroactive application of 11 C.F.R. § 100.57, a Commission regulation effective as of January 1, 2005, which explicitly states that funds received in response to a communication which indicate that "any portion of the funds received will be used to support or oppose a clearly identified Federal candidate" will be treated as contributions under the Act. *See* TFT Response at 2, 4-6; Supplemental Response at 1-2. TFT further argues that funds received by an organization are not contributions under the Act unless the funds are used to make a contribution to a candidate, to make an express advocacy expenditure, or to make an expenditure coordinated with a candidate. *See* TFT Response at 14.

The GC Brief does not rely on or cite Section 100.57 to conclude that funds received in response to TFT's solicitations constitute contributions under the Act. Furthermore, TFT misstates the applicable law at the time of its solicitations. In enacting Section 100.57, the Commission codified the standards for communications that constitute contributions previously set forth by a federal court in *FEC v. Survival Education Fund*, 65 F.3d 285, 295 (2d Cir. 1995).¹ In the Explanation and Justification for 11 C.F.R. § 100.57, the Commission noted that the standard outlined in Section 100.57 drew support from *Survival Education Fund*. *See Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and*

¹ Moreover, the Commission has long recognized the connection between solicitation language and federal elections. *See, e.g.*, 11 C.F.R. § 102.5(a)(2)(ii) (organizations that are political committees that finance political activity in connection with both federal and non-federal elections may receive into their federal accounts contributions that result from a solicitation which expressly states that the contribution will be used in connection with a federal election). *See also* 11 C.F.R. § 102.5(a)(3) (2001) (political party committee solicitations referencing federal candidates or federal elections were presumed to be for the purpose of influencing federal elections and contributions resulting from such solicitations were subject to the prohibitions and limitations of the Act) (deleted after BCRA prohibited national party committees from raising and spending non-federal funds).

28044184704

1 *Nonconnected Committees*, 69 Fed. Reg. 68056, 68057 (Nov. 23, 2004); *Supplemental*
2 *Explanation and Justification Regarding Political Committee Status*, 75 Fed. Reg. 5595, 5602
3 (Feb. 7, 2007) ("The Commission's new rule at 11 CFR 100.57 codifies the SEF analysis.").
4 Thus, while Section 100.57 was a "new rule" in that it was not in the Commission's regulations
5 before January 1, 2005, it is not materially different from the leading federal court interpretation
6 of the statutory definition of "contribution" in effect when TFT made the solicitations at issue.

7 TFT's argument that the funds received did not constitute "contributions" under *Survival*
8 *Education Fund* unless the funds were used to make contributions to candidates or to make
9 express advocacy expenditures, *see* TFT Response at 4-6, misapprehends *Survival Education*
10 *Fund* and is inconsistent with the Commission's interpretation of that opinion in other matters.²
11 As discussed in the GC Brief, the Second Circuit considered whether a solicitation sought
12 "contributions" and, was subject to the Act's disclaimer requirements under 2 U.S.C. § 441d(a),
13 stating,

14 Even if a communication does not itself constitute express
15 advocacy, it may still fall within the reach of § 441d(a) *if it*
16 *contains solicitations clearly indicating that the contributions will*
17 *be targeted to the election or defeat of a clearly identified*
18 *candidate for federal office* Only if the solicitation makes plain
19 that the contributions will be used to advocate the defeat or success
20 of a clearly identified candidate at the polls are they obliged to
21 disclose that the solicitation was authorized by a candidate or his
22 committee.

² The Commission relied, in part, upon an application of *Survival Education Fund* in finding probable cause to believe and ultimately filing suit against Club for Growth for failing to register and report as a political committee. *See* General Counsel's Report #2 in MUR 5365 (Club for Growth), Complaint, *FEC v Club for Growth, Inc*, No 1 05-cv-01851-RMU (D D C filed Sept 19, 2005) Recently, the Commission also relied, in part, upon an application of *Survival Education Fund* in finding reason to believe that several 527 organizations active in the 2004 election cycle violated the Act by failing to register with the Commission as political committees and file disclosure reports. *See* Commission Certifications approving Factual and Legal Analyses and
in MUR 5568 (Empower Illinois Media Fund) (January 22, 2007), MUR 5753 (League of Conservation Voters) (July 18, 2006), MUR 5752 (Environment2004 Action Fund and Environment2004, Inc) (July 18, 2006), MUR 5754 (MoveOn.org Voter Fund) (July 19, 2006), MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth) (July 19, 2006), MUR 5487 (Progress for America Voter Fund) (July 19, 2006)

1 See GC Brief at 6-7 (*quoting* 65 F.3d at 295 (emphasis added)). Citing the mailer's statement,
2 "Your special election-year contribution will help us communicate your views to the hundreds of
3 thousands of members of the *voting public*, letting them know why Ronald Reagan and his anti-
4 people policies *must* be stopped," the court held that the mailer was a solicitation of
5 contributions, concluding that this statement "leaves no doubt that the funds contributed would
6 be used to advocate Reagan's defeat at the polls, not simply to criticize his policies during an
7 election year." 65 F.3d at 295 (emphasis in original). Under *SEF*, the relevant analysis is
8 whether the funds solicited would be used to target the election or defeat of a clearly identified
9 federal candidate. Whether the solicitation indicates that the funds will be used for express
10 advocacy, and whether such funds are actually used for express advocacy, does not determine
11 whether the funds solicited result in a contribution under *SEF*.

12 TFT's argument that the use of the funds determines whether an organization has
13 accepted a contribution under the Act would effectively eliminate the contribution aspect of
14 determining political committee status. If a receipt is not considered a contribution until
15 expended for express advocacy purposes, then the \$1,000 contribution requirement would no
16 longer serve as an independent basis for establishing political committee status. Furthermore,
17 under TFT's analysis, an organization would not be able to determine if funds received constitute
18 a contribution until after the funds are expended for either direct contributions or for express
19 advocacy disbursements, making it impossible to fulfill the disclosure requirements under the
20 Act. In short, there is no basis for TFT's proposed construction of the term "contribution" and
21 neither the courts nor the Commission have adopted such a statutory construction.

22 TFT further argues that the funds it received did not constitute "contributions" because
23 the solicitations themselves do not contain express advocacy; rather, according to TFT, the

28044184706

1 solicitations simply ask donors to contribute money to raise public awareness of the issue of
2 George W. Bush's military service. *See* TFT Response at 9-11. TFT's argument reflects a
3 further misreading of *Survival Education Fund*, which explicitly did not address the issue of
4 whether the mailer at issue constituted express advocacy.³ *See* 65 F.3d at 290. Further, TFT's
5 solicitations, with their emphasis on "key swing states" and "American voters," cannot be fairly
6 described as merely "issue" communications.⁴

7 In fact, all of the solicitations by TFT cited in the GC Brief make it clear that TFT
8 intended to use the funds it received to target the defeat of George Bush in the upcoming
9 election. *See* GC Brief at 3, 7-9. TFT's initial solicitation asked for funds in order to respond to
10 attacks against John Kerry by President Bush, by the "Bush spin machine" and by President
11 Bush's "discredited henchmen." *See* Attachment 3 at 1. The solicitation makes clear that the
12 funds received would be used strategically to counter the attacks on Mr. Kerry by running
13 advertisements "in key swing states" criticizing President Bush's National Guard service. *See*
14 GC Brief at 3. TFT's subsequent solicitations, issued less than a month before the November
15 2004 election, asked potential donors for funds to air a new TFT advertisement so that

³ Moreover, as noted in the GC Brief, some of the statements in TFT's solicitations may well have expressly advocated John Kerry's election or President Bush's defeat. *See* GC Brief at 9, fn 9. The low cost of the email solicitations, however, would not have met the \$1,000 expenditure threshold for political committee status under 2 U.S.C. § 431(4)(A). *See id*

⁴ TFT also asserts that the email form of its solicitations exempts them from regulation under the Act, citing the definition of "public communication" that excluded Internet communications at the time of TFT's solicitations. *See* TFT Response at 11-12, 11 C.F.R. § 100.26. TFT's reliance is misplaced. Whether TFT's solicitations are public communications or not has no bearing on the conclusion that the resulting funds are contributions. The only exemptions to the definition of "contribution" relating to public communications involve volunteer activity and voter registration and GOTV, which are not at issue here. *See* 11 C.F.R. §§ 100.87, 100.88, 100.89 (exemptions do not apply in connection with public communications). Also not at issue here are coordinated communications, for which the nature of communications as public communications is part of the analysis as to whether contributions are made. *See* 11 C.F.R. § 109.21(c) (public communication component of content standards). In sum, the email form of TFT's solicitations affects neither the substance of the solicitations nor the nature of the funds received in response thereto. *See* MURs 5754 (MoveOn.org Voter Fund) and 5487 (Progress for America Voter Fund) (two 527 organizations that made most of their fundraising solicitations by email and have conciliated with the Commission)

28044184708

1 “American voters” could hear “Stacy,” the wife of a National Guardsman serving in Iraq, tell her
2 “sincere, emotional account of Bush’s hypocrisy and lack of integrity.” *See id.* at 8; Attachment
3 3 at 2-3. Here TFT is explicitly telling potential donors that their donations would be used to
4 inform “American voters” of very negative characteristics of President Bush. The reference to
5 “American voters” is entirely election-related, and the request for funds to finance ads attacking
6 President Bush’s purported hypocrisy and lack of integrity just weeks before the election
7 indicates to potential donors that their donations would be used to defeat President Bush. *See*
8 GC Brief at 8. Days later, TFT issued additional solicitations even more explicitly advising
9 potential donors that their donations would be used to influence the election. This third round of
10 solicitations specified that “Stacy” would be telling her story in “key swing states” thanks to
11 donors’ support, and that TFT was raising money to double its advertising buy so that “twice as
12 many American voters” could hear Stacy’s “sincere, emotional account of Bush’s hypocrisy and
13 lack of integrity.” *See* GC Brief at 8-9; Attachment 3 at 4-5. In referencing both “key swing
14 states” and “American voters,” these solicitations tell potential donors not only of TFT’s
15 intention to use their donations to influence the election by addressing its advertisements to
16 voters, but also to exercise this influence strategically by addressing its advertisements to voters
17 in “swing states.” From its inception to the end of 2004, TFT received over \$500,000 from
18 donors, including those who received such solicitations.⁵

19 2. Texans for Truth’s Major Purpose was Federal Campaign Activity

20 The Supreme Court has held that “[t]o fulfill the purposes of the Act” and avoid
21 “reach[ing] groups engaged purely in issue discussion,” only organizations whose major purpose

⁵ TFT stated that it did not keep fundraising records indicating the amount of funds received in response to particular solicitations. Nevertheless, as described in the GC Brief, there can be no doubt that based on TFT’s total receipts of over \$500,000, the funds received in response to the solicitations discussed above exceeded \$1,000. *See* GC Brief at 9-10, Attachment 3

1 is campaign activity can be considered political committees under the Act. *See, e.g., Buckley v.*
2 *Valeo*, 424 U.S. 1, 79 (1976); *Federal Election Commission v Massachusetts Citizens for Life*,
3 479 U.S. 238, 262 (1986) (“MCFL”).

4 An organization’s “major purpose” may be established through public statements of
5 purpose. *See, e.g., FEC v Malenick*, 310 F Supp. 2d 230, 234-36 (D.D.C. 2004) (court found
6 organization evidenced its “major purpose” through its own materials which stated the
7 organization’s goal of supporting the election of Republican Party candidates for federal office
8 and through efforts to get prospective donors to consider supporting federal candidates); *FEC v.*
9 *GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) (“organization’s [major] purpose may be
10 evidenced by its public statements of its purpose or by other means”).

11 An organization also can satisfy *Buckley*’s “major purpose” test through sufficient
12 spending on campaign activity. *See MCFL*, 479 U.S. at 262-64 (political committee status would
13 be conferred on MCFL if its independent spending were to become so extensive that the group’s
14 major purpose may be regarded as campaign activity); *see also Richey v. Tyson*, 120 F. Supp. 2d
15 1298, 1310, n.11 (S.D. Ala. 2002) (“As a threshold matter, the plaintiffs inaccurately describe
16 the activity to which the major purpose inquiry relates. The plaintiffs describe the relevant major
17 purpose as one to ‘expressly advocate’ a particular election result, while the Supreme Court has
18 described the relevant major purpose (under FECA) as ‘the nomination or election of a
19 candidate,’ or simply ‘campaign activity,’ terms that comfortably reach beyond explicit
20 directions to vote a particular way.”).

21 TFT satisfies the major purpose test set forth in *Buckley*. In its entire existence, TFT
22 focused all of its activities on the 2004 presidential election (other than routine administrative
23 matters and defending itself in this matter). TFT was formed only two months before the 2004

1 general election, in response to attacks on John Kerry by Swift Boat Veterans for Truth, and
2 engaged in no activity after the election. Of the funds TFT raised, it spent \$303,000 to finance
3 three television advertisements attacking President Bush's military service in "key swing states"
4 shortly before the 2004 presidential election. TFT spent an additional \$250,788 – almost all of
5 its remaining funds – to pay for management and consulting fees, public relations services,
6 online donations fees and other website costs, and legal fees. Further, TFT never advocated a
7 candidate in, or even commented on, any other 2004 election, either federal or non-federal, and
8 engaged in no activity that did not directly relate to the 2004 presidential election. *See* GC Brief
9 at 12-14.

10 Moreover, TFT has been virtually inactive since the November 2004 presidential
11 election. Since January 1, 2005, TFT has received no funds and spent \$44,265, mostly during
12 the first half of 2005 and mostly for administrative expenses.⁶

13 TFT's own website described the organization narrowly in terms of its belief that "time
14 has come for America to learn the truth about" the "shadowy past" of a single candidate, George
15 W. Bush. On its website and in some solicitations, TFT promoted a single book, titled *Unfit*
16 *Commander: Texans for Truth Take On George W Bush*. Moreover, Glenn W. Smith, the
17 founder of TFT who sent the solicitations, admitted under oath that the advertisements were
18 intended to influence the election:

19 Well, it is pretty obvious that this came in advance of an election, so I wanted this
20 awareness there so that as people began to make their considerations of who to
21 vote for, this might play a part in that....
22

⁶ On its 2006 Year End Form 8872 filed with the IRS, TFT disclosed the receipt of a \$10,000 in-kind contribution from Glenn W. Smith for "Legal expenses." TFT styled this Form 8872 as a "Final Report" to the IRS and simultaneously filed an amended Form 8871, Notice of Section 527 Status, as a "Final Notice."

28044184710

1 Transcript of Deposition of Glenn W. Smith at 78:16-20. This evidence of TFT's activities and
2 statements establishes that TFT's major purpose was federal campaign activity, specifically
3 defeating George Bush in the 2004 election.

4 TFT argues that application of the major purpose test is not appropriate because it did not
5 make any contributions to federal candidates or make express advocacy expenditures. *See* TFT
6 Response at 13-16. TFT's argument is premised on an incorrect reading of the Act. The Act
7 defines a "political committee" as any committee, club, association, or other group of persons
8 that *receives* "contributions" or makes "expenditures" which aggregate in excess of \$1,000
9 during a calendar year. *See* 2 U.S.C. § 431(4)(A). As discussed above, TFT triggered the
10 statutory threshold for political committee status by *receiving* more than \$1,000 in
11 "contributions." After triggering either the contribution or expenditure threshold for political
12 committee status, the Commission then looks to whether an organization has a major purpose
13 consistent with being a political committee. Based on TFT's statements of purpose and its
14 disbursements for campaign activity in connection with the 2004 presidential election, it is clear
15 that TFT had the major purpose of engaging in federal campaign activity.

16 TFT also asserts that it followed the Act's electioneering communication provisions and
17 that a determination that TFT acted as a political committee would render those provisions
18 meaningless. *See* TFT Response at Summary Page and at 3. TFT further argues that in enacting
19 legislation regarding entities organized under Section 527 of the Internal Revenue Code,
20 Congress could have determined – but did not – that Section 527 entities were political
21 committees under the Act and thus were subject to the Act's disclosure requirements and
22 contribution limitations and prohibitions. *See id.* at 17-18.

28044184711

28044184712

1 TFT's argument ignores the basic provisions of the Act TFT is a political committee
2 based on its receipt of contributions and its major purpose. As a political committee, TFT's
3 disbursements are expenditures and as such are exempt from the definition of electioneering
4 communications See 2 U.S.C. § 434(f)(3)(B)(ii), 11 C.F.R. § 100.29(c)(3); *Explanation and*
5 *Justification of Regulations for Electioneering Communications*, 67 Fed. Reg. 65,190, 65,198
6 (Oct. 23, 2002) There is no statutory exception to the Act's definitions of "contribution" and
7 "political committee" for Section 527 entities or activity within 60 days of a general election and
8 disclosed as electioneering communications See 2 U.S.C. §§ 431(8)(A) and 431(4) In sum,
9 TFT's receipt of contributions and its major purpose of campaign activity – resulting in political
10 committee status – are trumped by neither its disclosure of the costs of its television
11 advertisements as electioneering communications nor its status as a Section 527 entity.

12 3 Conclusion

13 Accordingly, as discussed above, TFT exceeded the threshold for political committee
14 status set forth in 2 U.S.C. § 431(4) by receiving over \$1,000 in contributions in response to
15 fundraising solicitations clearly indicating that the funds received would be targeted to the defeat
16 of a clearly identified federal candidate Therefore, because TFT also had the major purpose of
17 federal campaign activity, we recommend that the Commission find probable cause to believe
18 that Texans for Truth violated 2 U.S.C. §§ 433 and 434 by failing to register as a political
19 committee with the Commission and disclose its receipts and disbursements to the public
20 through reports filed with the Commission.

21 **B. Texans for Truth Knowingly Accepted Excessive Contributions in Violation**
22 **of 2 U.S.C. § 441a(f)**
23

24 As a political committee, TFT should have complied with the Act's contribution limits.
25 See 2 U.S.C. § 441a(f) However, of the over \$500,000 in contributions that TFT accepted from

1 individuals, \$101,000 was in amounts in excess of \$5,000. Accordingly, we recommend that the
2 Commission find probable cause to believe that Texans for Truth violated 2 U.S.C. § 441a(f) by
3 knowingly accepting contributions in excess of \$5,000.

4 **C. Texans for Truth Did Not Knowingly Accept Contributions in Violation of**
5 **2 U.S.C. § 441b(a)**

6 The Commission previously found reason to believe that TFT violated 2 U.S.C. § 441b(a)
7 by knowingly accepting corporate and/or union contributions. Our investigation has produced
8 no credible evidence that TFT received corporate and/or union contributions. Accordingly, we
9 recommend that the Commission take no further action with respect to the reason to believe
10 finding that Texans for Truth violated 2 U.S.C. § 441b(a).

11 **IV. CONCILIATION**

28044184714

V. RECOMMENDATIONS


1. Find probable cause to believe that Texans for Truth violated 2 U.S.C. §§ 433 and 434 by failing to register as a political committee with the Commission and report its contributions and expenditures.
2. Find probable cause to believe that Texans for Truth violated 2 U.S.C. § 441a(f) by knowingly accepting contributions in excess of \$5,000.
- 3.
4. Take no further action with respect to the reason to believe finding that Texans for Truth violated 2 U.S.C. § 441b(a).
5. Approve the appropriate letter.

June 19, 2007
Date

Thomasenia P. Duncan
Thomasenia P. Duncan
General Counsel

Ann Marie Terzaken
Ann Marie Terzaken
Acting Associate General Counsel
for Enforcement

Cynthia E. Tompkins
Cynthia E. Tompkins
Assistant General Counsel



Mark Allen
Attorney

Attachments

1. Texans for Truth Response Brief
2. Texans for Truth Supplemental Response Brief
- 3.
- 4.
- 5.

28044184715